

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:

THOMAS STORY MCNEAL
(Chapter 7 Case 92-20019)

Debtor

BRUNSWICK FLOORS, INC.

Plaintiff

v.

THOMAS STORY MCNEAL

Defendant

Adversary Proceeding

Number 92-2099

MEMORANDUM AND ORDER

Plaintiff filed this adversary proceeding against Debtor on April 27, 1992. Plaintiff argues that it was defrauded by Debtor and that Debtor's obligation should be non-dischargeable. The trial of this case was held on April 8, 1993. Upon consideration of the evidence adduced at the hearing, the briefs submitted by the parties and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed for bankruptcy in 1992. Debtor's business, Tom McNeal Construction Company, Inc., also filed for bankruptcy, but that case was dismissed. Debtor was president of his construction company.

On April 23, 1991, Tom McNeal Construction Company, Inc., and Julie White entered into a construction agreement in which Debtor's company promised to build Ms. White's home.

On August 1, 1991, Debtor signed a "General Contractor's Final Affidavit" regarding construction of the home. The affidavit in typed form provided that all bills for materials had been paid. Debtor, in his handwriting, wrote beside the first paragraph, "All bills aware of paid. Intend to pay bills received subsequently." The affidavit was signed by Thomas S. McNeal:

Who, after being sworn, deposes and states on oath as follows: that deponent (or said corporation if deponent is making this affidavit as a corporate officer) is a general contractor doing business in Glynn County . . .

See Plaintiff's Exhibit "1", General Contractor's Final Affidavit.

Plaintiff provided floor covering and wallpaper for the Julie White home.

Plaintiff's proposal for the work was submitted to McNeal Construction Company and to the attention of Doug McNeal, Debtor's brother and vice-president of Tom McNeal Construction Company, Inc., on or about June 8, 1991. *See* Plaintiff's Exhibit "1". The flooring was installed by Plaintiff on or about July 19, 1991. *See* Plaintiff's Exhibit "2". The invoice submitted by Plaintiff for work at the Julie Smith house shows that McNeal Construction was billed \$2,212.36 for the work. This invoice is dated January 31, 1992. *See* Defendant's Exhibit "2".

Debtor testified that his brother handled the transactions with Plaintiff and that he considered the debt to be owed by his construction company. Debtor testified that he intended to pay the bills owed to Plaintiff at the time he signed the affidavit.

CONCLUSIONS OF LAW

Debts obtained by fraud are non-dischargeable in a bankruptcy proceeding. Section 523 of the Bankruptcy Code provides in pertinent part:

- (a) A discharge . . . does not discharge an individual debtor from any debt--
- (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
 - (A) false pretenses, a false representation, or actual fraud, other than a statement representing the debtor's or an insider's financial condition.

11 U.S.C. §523(a)(2)(A). The burden of proof in non-dischargeability actions is upon the plaintiff excepting to discharge to show by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed 2d 755 (1991). The preponderance of the evidence standard, instead of the clear and convincing evidence standard should apply to all of the exceptions to discharge, including the exception to discharge for debts involving a debtor's fraud.

In order to preclude the discharge of a particular debt because of fraud, a creditor must prove the following:

- (1) The debtor made a false representation with the purpose and intention of deceiving the creditor;
- (2) The creditor relied upon such representation;
- (3) The reliance was reasonably founded; and
- (4) The creditor sustained a loss as a result of the representation.

In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Phillips, 804 F.2d 930 (6th Cir. 1986); In re Lacey, 85 B.R. 908 (Bankr. S.D.Fla. 1988). *See also* In re Mullet, 817 F.2d 677 (10th Cir. 1987) (Reliance must be reasonable); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985) (Plaintiff must demonstrate reliance on the debtor's representations; In re Dobbs, 115 B.R. 258, 265 (Bankr. D.Idaho 1990); Matter of Carpenter, 53 B.R. 724, 729 (Bankr. N.D.Ga. 1985) (actual fraud).

In order to be non-dischargeable the objecting creditor must show that property was obtained by fraud in the inception. In re Marazino, 67 B.R. 394 (Bankr. D.Kan. 1986). In other words, the original debt must have been incurred through fraudulent conduct. *See In re Barney*, 186 B.R. 105 (Bankr. N.D. Ohio 1987). The intent to deceive must be present at the time the goods and services are obtained not later. Pitt, 121 B.R. at 495.

I conclude that Plaintiff has not met its burden of proof in this case. First, the affidavit signed by Debtor was not false. A handwritten note states that all bills Debtor was aware of had been paid and that he intended to pay all future bills. There was no evidence that any unpaid bill outstanding was known to Debtor when the affidavit was signed or that he did not intend to pay those subsequently received.

This court has held that officers and directors of corporations may be held liable for the debts of the corporation to the extent of their participation in tortious acts resulting in harm to a third party. Matter of Sturgess, Chapter 7 Case No. 90-41750, Adv. No. 90-4210, slip op. at 7 (Bankr. S.D.Ga. May 22, 1991). *See also Ford Motor Credit Co. v. Owens*, 807 F.2d 1556, 1559-60 (11th Cir. 1987). However, the proof here fails to show that Debtor made a false statement for which he should be held personally liable. Moreover, there is no evidence that the person to whom the affidavit was given has been harmed or that Plaintiff, to whom the affidavit was not delivered, relied upon it in extending credit.

Based on the above conclusions I find that Plaintiff has failed to prove the

elements necessary to sustain its action under Section 523(a)(2)(A).

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Debtor, Thomas Story McNeal, to Plaintiff, Brunswick Floors, Inc., in the amount of \$2,276.28 is discharged in this bankruptcy proceeding. Debtor's counterclaim is dismissed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1993.